

FEDERAL COURT OF AUSTRALIA

Trivedi v Minister for Immigration and Border Protection [2014] FCAFC 42

Citation: Trivedi v Minister for Immigration and Border Protection [2014] FCAFC 42

Appeal from: Trivedi & Ors v Minister for Immigration, Multicultural Affairs and Citizenship & Anor [2013] FCCA 578

Parties: **BINA TRIVEDI, NIRAV YOGESHBHAI TRIVEDI and DARSH NIRAVBHAI TRIVEDI v MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP and MIGRATION REVIEW TRIBUNAL**

File number(s): NSD 1576 of 2013

Judge(s): **ALLSOP CJ, BUCHANAN J AND RANGIAH J**

Date of judgment: 4 April 2014

Catchwords: **MIGRATION** – provision of information that is false or misleading in a material particular – whether information must be provided knowingly – Public Interest Criterion 4020 – no jurisdictional error – appeal dismissed

Legislation: *Migration Act 1958* (Cth), ss 97, 100, 111
Migration Amendment Regulations 2011 (No. 1) (Cth)
Migration Regulations 1994 (Cth), Sch 2, cl 886.224, 886.225(a), Sch 4 Pt 1, criterion 4020

Cases cited: *Cameron v Holt* (1980) 142 CLR 342
Construction, Forestry, Mining and Energy Union v Hadgkiss (2007) 169 FCR 151
Murphy v Farmer (1988) 165 CLR 19
Trivedi & Ors v Minister for Immigration, Multicultural Affairs & Citizenship & Anor [2013] FCCA 578
Vyas & Anor v Minister for Immigration & Anor [2012] FMCA 92

Date of hearing: 19 February 2014

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs:	56
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**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1576 of 2013

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

**BETWEEN: BINA TRIVEDI
First Appellant**

**NIRAV YOGESHBHAI TRIVEDI
Second Appellant**

**DARSH NIRAVBHAI TRIVEDI
Third Appellant**

**AND: MINISTER FOR IMMIGRATION, MULTICULTURAL
AFFAIRS AND CITIZENSHIP
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGES: ALLSOP CJ, BUCHANAN J AND RANGIAH J

DATE OF ORDER: 4 APRIL 2014

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The name of the first respondent be changed to ‘Minister for Immigration and Border Protection’.
2. The appeal be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
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NSD 1576 of 2013

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First Appellant**

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**AND: MINISTER FOR IMMIGRATION, MULTICULTURAL
AFFAIRS AND CITIZENSHIP
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGES: ALLSOP CJ, BUCHANAN J AND RANGIAH J

DATE: 4 APRIL 2014

PLACE: SYDNEY

REASONS FOR JUDGMENT

ALLSOP CJ

1 1 I have read the reasons for judgment of Buchanan J to be published. I agree
with them and with the orders proposed by his Honour.

I certify that the preceding one (1)
numbered paragraph is a true copy
of the Reasons for Judgment herein
of the Honourable Chief Justice
Allsop.

Associate:

Dated: 4 April 2014

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1576 of 2013

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

**BETWEEN: BINA TRIVEDI
First Appellant**

**NIRAV YOGESHBHAI TRIVEDI
Second Appellant**

**DARSH NIRAVBHAI TRIVEDI
Third Appellant**

**AND: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGES: ALLSOP CJ, BUCHANAN J AND RANGIAH J

DATE: 4 APRIL 2014

PLACE: SYDNEY

REASONS FOR JUDGMENT

BUCHANAN J:

Background

2 2 On 27 July 2009 the first appellant applied for a skilled (residence) (class VB) visa. Specifically, she asked to be considered for the grant of a skilled – sponsored (subclass 886) visa. Amongst the conditions for that visa subclass were that she had satisfied the “Australian study requirement” – (i.e. in the six months before the date of application she had completed one of stipulated qualifications requiring at least two years study in Australia while holding a student visa), and that she be sponsored by a relative. That relative was the first appellant’s brother. Included in the visa application was the first appellant’s husband

(the second appellant) and their son (the third appellant). The success of the application depended upon success by the first appellant.

3 The first appellant, at that time, held a student visa. She indicated that she had achieved a Bachelor of Commerce degree in India and then a Master of Commerce (Professional Accounting) degree from the Melbourne Institute of Technology (Sydney). She gave accountant as her nominated occupation. In support of her application the first appellant nominated her language ability (and that of her husband) as “competent” and said they had each recently taken an IELTS English test (she on 21 March 2009 and her husband on 7 March 2009). The first appellant gave reference numbers for her test and she provided what purported to be a copy of the test report form. The test report form showed that the first appellant had received the following results: listening – 6.5, reading – 6.0, writing – 6.5, and speaking – 6.0, for an overall band score of 6.0.

4 In evidence given later to the Migration Review Tribunal (“the MRT”) to whose deliberations I shall refer in due course, the first appellant said that she took the IELTS test whilst on a visit to India, rather than in Australia.

The delegate’s decision

5 When the first appellant’s application for a visa was assessed within the Minister’s Department, reference was made to an online verification service to confirm the IELTS scores. Information was obtained that the first appellant had in fact received the following scores: listening band – 6.5, reading band – 6.0, writing band – 5.5 and speaking band – 5.5. These scores did not meet the standard for competent English, which required an IELTS test score of at least 6 for each of the four test components. By letter dated 1 December 2010, this information was drawn to the attention of the first appellant and she was invited to comment.

6 At first the first appellant did not reply. It appears from evidence later given to the MRT that the first appellant then made further attempts at the IELTS test in Australia (in January and February 2011) and finally achieved the required scores on 5 March 2011. The appellants’ solicitor and migration agent then replied on 18 March 2011, but only by providing a copy of a new IELTS test result form showing that the first appellant had now achieved the required standard.

7 On the same day, 18 March 2011, another letter was sent to the first appellant, again inviting her to comment on the provision of the earlier incorrect information. On 21 March 2011 the migration agent replied on her behalf:

The applicant has asked me to make a response on behalf of them.

She said that it was not a right document.

She submitted it wrongly, because she said that she was misguided by certain agents in India.

She said that she was very sorry for that, she should not have been so gullible and have trusted so scrupulous agents.

She said that she did wrong and had not intention to rely on that for a positive result from the department.

So she has been working hard to do IELTS again and again. Eventually she achieved the required standards for competent English.

She requested that the Department accept her deep repentance for that matter and wished to draw a deep lesson from that.

She begged that she be forgiven, and **she has achieved the required English outcome by her own efforts anyway.**

(Emphasis added.)

8 On 11 April 2011 the first appellant was notified by letter that the visa application had been refused for herself, her husband and their son. The reason given for the refusal was that the first appellant did not satisfy the mandatory requirement for the grant of a visa then contained in cl 886.224 of Schedule 2 to the *Migration Regulations 1994* (Cth) which was in the following terms:

886.22 Criteria to be satisfied at time of decision

...

886.224 No evidence has become available since the time of application that the information given or used:

(a) to meet the requirements of item 1136 of Schedule 1; or

(b) to satisfy Subdivision 886.21; or

(c) to satisfy clause 886.221; or

(d) to obtain the skills assessment mentioned in subclause 886.223 (1);

was false or misleading in a material particular.

9 In essence, the information provided by the first appellant in relation to the IELTS test scores was found to have been “false or misleading in a material particular”. The first appellant’s application was assessed against alternative criteria but she was found not to satisfy those criteria.

The Migration Review Tribunal

10 The appellants then applied, on 13 April 2011, to the MRT for review of the delegate’s decision. The first appellant relied upon the achievement of the required results on 5 March 2011. She proffered the following written explanation for provision of the false results from India:

The first IELTS I appeared for in India was on 7th March, 2009. The IELTS test centre was in Ahmedabad, the same city where I was based and was 20 mins drive from my Father in laws house. I was very much confident that I will pass this time but unfortunately I couldn’t pass and got Listening – 6.0, Reading – 6.0, Writing – 5.0 and Speaking – 6.5, and the result was again not as per the requirement (please see the result attached). But I didn’t give up and said to myself that I can still do it and started preparing again for the next date of IELTS which was 21st March, 2009 (please see the IELTS test registration acknowledgement attached). The IELTS test centre was in a different city this time called Rajkot which is approximately 4 hours drive from Ahmedabad, the city I was based. I took a public transport to travel there 1 night before the IELTS test and stayed at my Uncle’s place. Next day on 21st March 2009 I went to the test centre to appear for the exams which was approximately 15 mins drive from my Uncle’s place. As I had failed for the first exam I was bit worried about this exam because I had to bring my son to Australia who was in India for 2 years. I was bit nervous in the exam, though the question paper was bit easy. The Gentleman who was the supervisor in the examination hall came to me and asked why I was nervous. I told him the reason that I had failed few times before, and **he said don’t worry and asked me to give him my old result dated 7th March 2009 and he will fix up the new result for me. When he said he will fix up I was bit happy and finished my exam in a relax mood.** At the end of the exam I gave him my old result which I was carrying in my handbag. I handed over my old result to him and **he said you will get your results for the exams dated 21st February [sic] in post as normal and you will pass the exam don’t worry.** The supervisor introduced himself as an agent of IELTS body. So there was no point for me not trusting him. I was so happy and had travelled back to Ahmedabad on the same day. I enjoyed the remaining 15 days stay in India with family, friends and my son.

(Emphasis added.)

11 The MRT conducted a hearing on 17 October 2012 which the first and second appellants attended and at which they gave evidence. At the hearing the first appellant

repeated, in substance, the same version of events, which the MRT in its decision recorded as follows:

35. ... The test centre on 21 March 2009 was in another city about four hours' drive away. She was a bit stressed because she was worried that she had not been able to achieve the scores before. **A supervisor at the test centre spoke to her and then said he would fix it up for her.** She thought he was an official IELTS agent. She then relaxed and did the test. After finishing the test, she gave a copy of her previous IELTS report form to him. ...

(Emphasis added.)

12 12 After the hearing before the MRT another representative acting on behalf of the first appellant made the following additional representations on her behalf:

The visa applicant explained to the Tribunal openly that she had no knowledge of any problems with her test results as well as she did not intentionally mislead the Department and she has no involvement and has no control over the document regarding her English test which came to her home in India and if the document was found fraudulent she had no involvement in perpetrating the fraud. She was unaware that there was anything wrong with the IELTS test until she received correspondence from the Department. She was horrified by the discovery and she immediately took action and sat for the IELTS test until she passed and the new result was sent to the Tribunal. In other words, the applicant soon after being notified that the document was false she rectified the problem and now asks the Tribunal to accept that she submitted the document sent to her by the Testing Centre in India and she sincerely does not concede that the test result is a bogus document at the time of lodging it but as soon as she became aware of it she booked a further IELTS test in Australia to demonstrate that she has competent English.

Until now **the applicant is shocked as to how the fraudulent document came to exist.** The applicant is sincere and proved to the Tribunal that she was not personally involved in the guilty act or guilty mind and she stated that she did not intentionally mislead the Department. The applicant did not wilfully or voluntarily provide a bogus document to the Department, the circumstances in which the visa was not granted.

The Tribunal is now asked to consider the evidence given under oath and accept the applicant's credibility, especially that **she was not personally involved in or aware of the deception.**

...

In this case the visa applicant was given a document which in her good faith she worked hard for and sat for examination with the intention to provide an honest result to the Department. **She was not aware that the document she**

submitted was a false document and on discovery she willingly made every effort to rectify the situation.

(Emphasis added.)

13 13 There was, therefore, no issue before the MRT about the character or deceptive quality of the IELTS test result form provided initially by the first appellant. Rather, she sought to excuse her involvement as an innocent and unknowing one.

14 14 In its decision the MRT said:

52. The applicant has claimed that she has no knowledge of how the results came to differ between the test report form that she provided to the department and the results that she achieved. She has claimed that she was not aware that there was a problem until the department wrote to her inviting her to comment on the information. She claimed that she undertook two tests in India and that she had left India before she received the results from the 21 March 2009 test and received them by post upon her return to Australia, through her in-laws. The applicant claimed that when she went to take the test on 21 March 2009, the supervisor of the test came and spoke to her as she appeared stressed and told her that he could “fix up” her results after she told him she had failed a number of times. It was submitted that the applicant was not personally involved in or aware of the deception and that she did not wilfully or voluntarily provide a bogus document to the department. It was further submitted that the applicant did not intentionally mislead the department and thus the result was not provided by herself but was imposed on her.

53. However, the requirements in PIC 4020 apply whether or not the document is provided by the applicant knowingly or unwittingly: *Vyas v MIAC* [2012] FMCA 92. Accordingly, the Tribunal finds that once there is evidence that the applicant has given a bogus document or information that is false or misleading in a material particular, PIC 4020 applies, regardless of how such a document came into existence or came to be given. It is, therefore, unnecessary to consider the applicant’s knowledge or otherwise when considering this aspect of PIC 4020.

...

57. **The applicant did not claim that she had in fact achieved the scores in the test report form for the IELTS test on 21 March 2009 that she submitted.** Given that there is no dispute about this matter, the Tribunal finds on the evidence before it that the applicant achieved the test scores for the IELTS test on 21 March 2009 that were listed on the IELTS verification website and not the scores contained in the IELTS test result form that was submitted to the department by the

applicant. **The Tribunal finds that the test report form submitted by the applicant contained false or misleading information because the scores contained in that test report form were not correct.**

...

61. In respect of whether the test report form itself is a 'bogus document' for the purposes of PIC4020(1)(a), paragraph (b) of the definition of 'bogus document' in section 97 of the Act provides that a bogus document means a document the Minister reasonably suspects is a document that is counterfeit or has been altered by a person who does not have authority to do so.
62. If the applicant's claims are to be believed, a person who presented himself as working for IELTS at the test centre in Rajkot, India that she attended on 21 March 2009 arranged for a test report form that met the minimum requirements of having six or more in each test component to be provided to her without her knowledge. As her results do not match the official records of IELTS for the test reference number [number stated], **it appears that the document is counterfeit or has been altered by a person who does not have authority to do so.** However, as the Tribunal has found that there is evidence that the applicant has given, or caused to be given to the Minister or an officer, information that is false or misleading in a material particular in relation to the application for the visa, it is unnecessary for the Tribunal to make a finding as to whether the applicant has given, or caused to be given, a bogus document.

(Emphasis added).

15 15 Clause 886.224 was omitted by *Migration Amendment Regulations 2011 (No. 1)* (Cth) with effect from 2 April 2011. From that date Public Interest Criterion 4020 "(PIC 4020)" was inserted in cl 886.225(a). That was the test which the MRT was required to apply. Public interest criterion 4020 provides:

4020

- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.

- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse the application;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1) (a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

- (5) In this clause:

information that is false or misleading in a material particular means information that is:

- (a) false or misleading at the time it is given; and
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Note Regulation 1.03 defines ***bogus document*** as having the same meaning as in section 97 of the Act.

16 16 Section 97 of the *Migration Act 1958* (Cth) (“the Migration Act”) defines “bogus document” as follows:

97 Interpretation

In this Subdivision:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...

17 17 The MRT found that the IELTS test result form submitted by the first appellant in support of her application for a visa contained information that was false or misleading in a material particular. The MRT did not make an express finding that the IELTS test result form was a bogus document, saying it was unnecessary to do so. However, although the MRT found that it was unnecessary to “make a finding” about whether the IELTS test result form was a bogus document, because it was by providing the test result form that false and misleading information was given in the form of false test scores, it is inevitable, having regard to the provisions of s 97 of the Migration Act, that the document was (as the MRT said it appeared to be) a bogus document within the meaning of s 97 of the Migration Act and PIC 4020(1) and (3).

18 18 The MRT found that there were no grounds upon which it would be justified to waive the requirements of PIC 4020(1) and that it should not do so. The MRT therefore affirmed the decision of the delegate.

The Federal Circuit Court of Australia

19 19 The appellants then applied to the Federal Magistrates Court of Australia (“the FMCA”) – now the Federal Circuit Court of Australia (“the FCCA”) – for judicial review of the decision of the MRT. The central issue agitated before the FCCA was the contention that PIC 4020 only applied if the first appellant intended to mislead the Minister’s Department. That contention was rejected by the FCCA. On 17 July 2013 the application was dismissed (*Trivedi & Ors v Minister for Immigration, Multicultural Affairs & Citizenship & Anor*

[2013] FCCA 578). It is against that judgment and orders that the present appeal has been brought.

Extension of time to appeal

The appellants did not exercise their rights to appeal to this Court within the time prescribed, but shortly outside the time prescribed they made an application for an extension of time in which to appeal and provided a cogent explanation for the delay of one day which was involved. On 14 November 2013 a judge of this Court granted the extension of time and ordered that the hearing of the appeal be referred to a Full Court (*Trivedi v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 1455).

The issues on the appeal

Two questions were argued on the present appeal. The appellants argued that it was necessary that the first appellant be knowingly involved in the giving of false information for PIC 4020 to apply. I would not accept that contention. Conversely, the respondent argued first that no element of knowledge by a visa applicant was necessary, and secondly that information did not need to be purposely untrue for PIC 4020 to apply, because PIC 4020 was directed to any incorrect information that was relevant to a visa criterion. I would accept the first of those arguments but not the second.

It is convenient to deal first with the construction of PIC 4020 advanced by the respondent, which has been adopted by the FCCA and the MRT.

The respondent's arguments

Mental element

The respondent argued for the construction of PIC 4020 which was adopted in *Vyas & Anor v Minister for Immigration & Anor* [2012] FMCA 92 ("*Vyas*"), and which was applied by the FCCA and the MRT in the present case. *Vyas* involved facts similar to the present case. An applicant for the same subclass of visa submitted IELTS test results from an IELTS test centre in India, obtained at about the same time as in the present case (early 2009) during a visit of a few weeks. Checking showed the results were false. The test result form was treated by the MRT in that case as a bogus document.

In *Vyas*, the FMCA referred to observations in the majority judgment in the High Court in *Murphy v Farmer* (1988) 165 CLR 19 that:

the word “false”, when viewed in isolation, is a latently ambiguous one. As the dictionaries confirm, it can mean merely “untrue” or “wrong”. Or it can involve both subjective and objective elements and mean “purposely untrue”.

25 25 The FMCA then identified what it considered to be the purpose of PIC 4020 (at [65]):

65. ... Its purpose is not penal or quasi-penal. Rather, it seeks to ensure that an applicant for a visa truly fulfils the criteria for the visa. The provision of a document that is bogus or false or misleading information would, left unchecked, enable a person who falls short of visa criteria nonetheless to be granted a visa. In this respect, **it does not matter whether the document is provided by the applicant knowingly or unwittingly**. Either way, a prohibition on the provision of relevantly defective documents is required. Otherwise, undeserving applicants could receive a visa.

(Emphasis added.)

26 26 *Murphy v Farmer* stands as a clear statement that the word “false” takes meaning from the context in which it is used. In *Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151 (“*Hadgkiss*”), I attempted to explain why, in *Murphy v Farmer*, one meaning rather than the other was chosen to resolve the ambiguity which the legislation in that case showed up. In *Hadgkiss*, I also attempted to explain why there was no ambiguity in certain provisions of the *Workplace Relations Act 1996* (Cth) imposing penalties for providing false or misleading information. I concluded that knowledge was not necessary.

27 27 The respondent has relied, in answer to the appeal, on the majority judgments in *Hadgkiss* but, in my view, the question in the present case may not be resolved directly by reference to those judgments. Although *Hadgkiss* is authority for the proposition that a mental element is not an ingredient in all (indeed many) cases of statutory prohibition against giving false or misleading information, or making false or misleading statements, it is apparent from the judgments in that case that an important ingredient in the separate analyses by the majority judges concerned the significance of the circumstance that the statute in question (the *Workplace Relations Act 1996* (Cth)) referred expressly to knowledge when that was to be an element connected with making a false or misleading statement (Lander J at [50]-[55], Buchanan J at [64]-[67]). Those features, or ones approximating them, are not

shown to be present here. Nevertheless, I accept the basic premise stated in *Iyas*, that the visa applicant need not be complicit in any falsehood.

As it will be necessary to return to the first issue (the knowledge of the visa applicant) when I deal with the appellants' arguments, I will content myself with saying here that I am satisfied that it is not necessary a visa applicant know of, or be directly involved in, any falsehood for PIC 4020 to be engaged. I will return to that issue.

Purposely untrue

I turn to the character or quality of the documents or information to which PIC 4020 is directed.

Much, of course, depends on the context and perceived purpose of PIC 4020 as well as the terms in which the prohibition in question is expressed. In the present case, I think the intention and purpose of PIC 4020 are clearly revealed by the text and a consideration of the purpose for which the information is provided.

First, the references in PIC 4020(1) and (3) to a "bogus document or information that is false or misleading in a material particular" are ones which in my view give an indication of the character of improper material to which PIC 4020 is addressed. That construction is strengthened by reference to the interaction between PIC 4020 and s 97 of the Migration Act.

It is apparent from the terms of PIC 4020 that it addressed the problem of attempts to work a fraud or deception on the assessment of claims for a visa. That is also evident from the fact that PIC 4020 states a "public interest" criterion, from the narrow and exceptional circumstances necessary to waive its requirements and, more generally, from the serious consequences that follow from its application. I would not infer any apparent intention to disqualify a visa applicant who could explain an innocent mistake in a document or information provided by them. PIC 4020 is not directed, in my view, to innocent, unintended or accidental matters. However, different questions arise when information or documents provided in support of an application are revealed as false, in the purposely untrue sense of that term.

In my view, it should be accepted that an element of fraud or deception is necessary in order to attract the operation of PIC 4020. To take the example of bogus documents, a counterfeit document is not produced accidentally. Similarly, to charge that a

statement is false is not to say only that it is wrong. The accusation potentially imports some element of knowledge or intention on somebody's part, and in my view does so in the present context.

34 34 Secondly, consideration of the circumstances of the introduction of PIC 4020 confirms me in the view derived from the text of PIC 4020 that it is not directed to information or documents which are not tainted in the way I have indicated.

35 35 PIC 4020 was introduced as part of Schedule 4 to the *Migration Regulations 1994* (Cth) by amendments made by the *Migration Amendment Regulations 2011 (No. 1)* (Cth). The context in which PIC 4020 was introduced is not unimportant to a proper understanding of its purpose and intended effect.

36 36 At that time, the Migration Act contained (as it still does) a series of provisions (in Part 2, Division 3, Subdivision C) requiring visa applicants and non-citizens entering Australia to provide correct information in visa applications and on passenger cards. Bogus documents are not to be given. Incorrect answers or information are to be promptly corrected. These obligations apply whether a person knows the information to be correct at the time or not (s 100).

37 37 The obligation to provide correct information and answers and non-bogus documents applies to visa applicants, as well as persons entering Australia on a visa (e.g. a tourist visa). The same subdivision of the Migration Act provides that breach of its requirements might lead to cancellation of a visa, whether or not non-compliance was deliberate or inadvertent (s 111).

38 38 The Explanatory Statement issued with the *Migration Amendment Regulations 2011 (No. 1)* referred to those existing arrangements, saying:

Item [3] – Schedule 4, Part 1, after clause 4019

...

Sections 97 to 106 of the Act, in general, place obligations on applicants to provide correct information and to correct any incorrect information whether at the time of application or subsequently prior to visa grant. ...

39 39 The contrast between the reference to the existing provisions (correct/incorrect) and the language in new PIC 4020 (false or misleading) is obvious. One

explanation given by the Explanatory Statement for the need for the new provisions was as follows:

Item [3] – Schedule 4, Part 1, after clause 4019

...

... Further, it is common practice that a visa applicant will seek to withdraw the bogus documents, or false or misleading information or find alternative methods of satisfying the relevant visa criteria without relying on the false information. In circumstances where this occurs, a decision maker is required to accept the request to withdraw the information and continue to process the application.

40 40 As it happens, the practice so described is a close analogue with the present case.

41 41 The Minister, in the present appeal, pressed a submission that PIC 4020 applied to any “objectively” untrue statement or information provided by a visa applicant, which was material or relevant to satisfaction of a visa criterion. I understood the submission to be to the effect that even completely innocent mistakes would (subject to the waiver provisions in PIC 4020) be fatal to that visa application and any visa application by that applicant and “each member of the family unit” for the next three years. I cannot accept that argument.

42 42 The waiver provisions are very limited. That fact, consideration of the nature of the problem being addressed by the introduction of PIC 4020, the language used within it and the existing statutory arrangements confirm that the purpose of PIC 4020 is to deal with purposely untrue material.

43 43 In my view, it is not necessary (for reasons yet to be further developed) to show knowing complicity by a visa applicant. That would impose an impossible task on those administering the visa system. But it is necessary that the information or document have the necessary quality of purposeful falsity, whether or not the visa applicant can be shown to have knowledge of that fact.

44 44 Accordingly, I would not construe PIC 4020 in the same manner as the FCCA did in the present case, or in *Vyas*. However, that does not assist the appellants because it is clear that on the facts found by the MRT (which were not in substance in dispute) the IELTS test result form submitted by the first appellant with the visa application contained

information which was false or misleading in the requisite sense. It was, in truth, a bogus document.

The appellant's arguments

Knowing or complicit

45 The appellants argued on the present appeal (as they did before the FCCA) that PIC 4020 did not apply in the present case because there was no finding made by the MRT that the first appellant was knowing or complicit in the deceptive character of the information which she furnished.

46 It was also faintly suggested that there might have been an insufficient foundation for any finding by the MRT that the test result scores were falsely stated. That argument should be rejected immediately. It should be apparent from the recorded contributions of the first appellant which I set out earlier that there was no dispute (and really could not have been) that the document she provided contained false and deceptive information.

47 The appellants' argument about the need for complicity or intent by a visa applicant relied on *Murphy v Farmer* and on *Cameron v Holt* (1980) 142 CLR 342. The argument sought to link the meaning adopted by the majority in *Murphy v Farmer* (that, in that case, "false" meant "purposely untrue") with the statements by Barwick CJ in *Cameron v Holt* (at 346) that "presenting" a false document to an officer required consciousness of its contents and a guilty intent. Thus combined, the composite proposition was that PIC 4020 required it to be shown that the first appellant intended to provide false information.

48 In the circumstances of the present case I would accept the first strand of the argument but not the second.

49 For the reasons I have already given, it should be accepted that PIC 4020 is directed to information or documents which are purposely untrue. It seems to me to be clear from the same analysis that the purpose of PIC 4020 was to render visa applicants ultimately responsible for the veracity of the information and documents supplied to support the application. Although the limited terms of the waiver (and therefore any discretion to excuse non-compliance) make it apparent that innocent errors are not the focus of attention, it is equally clear that PIC 4020 is directed at the overall integrity of the visa system and as a

bulwark against deception and fraud from any quarter associated with a visa applicant. It is not inconsistent with a coherent public policy to make a visa applicant ultimately responsible for purposely untrue material provided with a visa application. It would be an intolerable burden on the administration of the visa system to require that those assessing visa applications not only discover that information or documents are false in a material particular, but also that the visa applicant who provided them knew them to be so. In many cases that would be impossible and would defeat the apparent intent of the provision.

50 50 There was no doubt in the present case (and in *Vyas*) that the IELTS test result form provided by the first appellant contained false information. It was clearly open to the MRT, on the other facts found by it, to conclude that it was bogus. It was a counterfeit. It was not the real thing. The fact that a formal declaration to that effect was not made in the present case does not alter the character of the document, or the information it contained. It was also open to the MRT to find, as it did, that the information thereby given by the first appellant was false or misleading in a material particular. It was not necessary to prove that the first appellant knew the contents of the document were false or misleading when she proffered it.

The grounds of appeal

51 51 The grounds of appeal relied on by the appellants are as follows:

Grounds of appeal

1. The Federal Circuit Court erred in failing to find that the decision of the Migration Review Tribunal dated 30 November 2012 was affected by jurisdictional error by reason that the Tribunal failed to determine whether the first appellant knowingly provided false or misleading information in relation to her visa application.
2. The Federal Circuit Court erred in failing to find that the decision of the Migration Review Tribunal dated 30 November 2012 was affected by jurisdictional error by reason that the Tribunal asked itself the wrong question and/or failed to consider a relevant matter by finding that PIC 4020(1) was satisfied whether or not the first appellant knowingly provided false or misleading information in relation to her visa application.

52 52 As to Ground 1 of the appeal, for the reasons I have given, it was not necessary for the MRT to find that the first appellant knowingly provided false information,

or to determine whether she knew or did not know that the information was false when she gave it.

53 53 As to Ground 2 of the appeal, in my respectful view the FCCA was correct to conclude that no mental element on the part of a visa applicant is required to engage PIC 4020. The information provided by the first appellant to the Minister's Department was misleading and false. That information was provided both in the body of the application and in the form of the document which falsely stated the IELTS scores.

Conclusion

54 54 In summary, I conclude that:

- • PIC 4020(1) refers to information that is false, in the sense of purposely untrue;
- • it is not necessary to conclude that a visa applicant is aware that information is purposely untrue, before PIC 4020 is engaged;
- • the FCCA was correct to conclude that the MRT did not make a jurisdictional error when it found that PIC 4020 was engaged in the present case.

55 55 In my view, the appeal should be dismissed with costs.

I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 4 April 2014

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1576 of 2013

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

**BETWEEN: BINA TRIVEDI
First Appellant**

**NIRAV YOGESHBHAI TRIVEDI
Second Appellant**

**DARSH NIRAVBHAI TRIVEDI
Third Appellant**

**AND: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGES: ALLSOP CJ, BUCHANAN J AND RANGIAH J

DATE: 4 APRIL 2014

PLACE: SYDNEY

REASONS FOR JUDGMENT

RANGIAH J:

56 56 I agree with Buchanan J.

I certify that the preceding one (1)
numbered paragraph is a true copy
of the Reasons for Judgment herein
of the Honourable Justice Rangiah.

Associate:

Dated: 4 April 2014